

MINUTES OF THE GOVERNMENT RECORDS COUNCIL

December 11, 2003

The meeting was called to order at 9:30 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education)

Absent: Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Mr. Maltese read a resolution to convene in closed session to receive legal advice concerning the complaints to be adjudicated that day. Ms. Hook moved to adopt the resolution that was seconded by Mr. Spigner. All members present approved the motion. The Council met in closed session from 9:35 to 10:30 a.m.

The Council reconvened in open session at 10:35 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meeting Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education)

Absent: Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Also Present: Deputies Attorney General Barbara Conklin, Juliet Wyne, and Andrea Grundfest, Acting Executive Director Paul Dice and Staff Associates Chris Malloy, Donna Siminski, Anthony Carbabelli, Gloria Luzzatto, and Brigitte Lillie.

Mr. Maltese asked Mr. Dice to review personnel matters. Mr. Dice reviewed the staff changes including the addition of Andrea Grundfest, Deputy Attorney General. The addition of a paralegal and resignation of an existing staff associate.

Mr. Maltese called for the adoption of minutes from the public meeting of November 13, 2003. A motion to accept the minutes was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Mr. Maltese called for the adoption and release to the public of the closed session minutes from November 13, 2003. A motion to accept the minutes was made by Ms. Schonyers and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Mr. Maltese asked for the Executive Director's Report. Mr. Dice stated that there were no reports at this time.

Mr. Maltese asked for a review of any communications. Mr. Dice overviewed communications received by the GRC.

Mr. Maltese requested to change the complaint adjudication agenda and recused himself from the Wicks complaint. Mr. Spigner stepped in for Mr. Maltese.

Douglas Wicks vs. Bernards Township Board of Education (2002-107)

Mr. Maltese recused himself from all discussions and the vote relating to this case. He asked Mr. Spigner to serve in his absence.

Mr. Dice reviewed the issues in the complaint providing that the complainant challenges the denial of an OPRA request to inspect the checks payable to Mr. Reinzi's and Horizon Group, the billing records and correspondence between the township BOE and the law firm representing the BOE on a legal issue.

Mr. Dice recommended that the Council:

1. Find that the copies of the checks, one of which contained redactions, satisfied this aspect of the request and this was confirmed verbally on November 14, 2003.
2. Find that the synopsis of the billing records was not in conformity with N.J.S.A. 47:1A-5(e) and the custodian is to provide the requestor immediate access to the requested billing records, subject to appropriate redactions.
3. To further determine if the correspondence is actually privileged, the custodian will be required to submit an index of the privileged documents by listing for each document the date, type of document, subject matter of the document, persons copied on the document, the sender and receiver of the document and an

explanation of why each document is privileged which should include a non-conclusory, comprehensive presentation of all factual grounds and legal analyses. The listing is to be provided to the Acting Executive Director no later than 10 days following the GRC decision.

4. Find that the custodian responded in a timely manner in six business days.

Mr. Spigner asked for a motion to support the Acting Executive Director's recommendations. The motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call.

Ayes: Ms. Hook, Ms Schonyers, and Mr. Spigner

Nays: None

Absent: Mr. Monzo, Mr. Maltese

Mr. Maltese returned to the Council meeting following the vote.

Evelyn Gardner v. Division of Youth and Family Services (DYFS) (2002-68)

Mr. Dice provided the members of the Council with an overview of the complaint. The case involved a request for information from DYFS pertaining to the requestor's adoption.

Acting Executive Director recommended that the Council find that there is a disclosure exemption or limitation for each requested item in accordance with N.J.S.A. 47:1A-9, "Other Laws, regulations, privileges unaffected." The Executive Director further recommends that the Council find that:

1. The requested information is confidential pursuant to:
 - a. N.J.A.C. 10:133G-2.5 (adoptive information)
 - b. N.J.A.C. 10:133G-2.3 (third party records in DYFS files)
 - c. N.J.S.A. 2A: 4A-60 (juvenile court records)
 - d. N.J.S.A. 9:6-8.10a (child abuse reports and investigations)
 - e. N.J.A.C. 10:1B-2.2(7) (identifying information regarding foster care placements such as dates of placement and names of caregivers)
 - f. N.J.S.A. 9:6-8.10a (DYFS caseworker identity)
2. The information voluntarily provided to the requestor by DYFS pertaining to her adoption and medical history is accessible by the requestor only under N.J.A.C. 10:133G-2.2(d) and N.J.A.C. 10:133G-2.3 at DYFS' discretion and does not make those documents publicly accessible pursuant to OPRA.
3. The custodian responded in a timely fashion to the OPRA request in 7-business days. While the custodian voluntarily provided discretionary information beyond the 7-day timeline, requestor access to those records is not governed by OPRA; and

4. This complaint should be dismissed.

A motion to accept the Acting Executive Director's recommendation was made by Ms. Hook. The motion was seconded by Ms. Schonyers and adopted by roll call.

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Mr. Maltese asked Mr. Dice to advise the requester that there are other alternate forms of access that she may wish to pursue in this matter.

Eva Grecco v. City of Garfield (2003-31)

Mr. Dice provided an overview of the complaint and recommended that the Council:

1. Find that the custodian advised that the requested document was not made, maintained or kept by the City of Garfield. Therefore, there was no denial of access to a "Government Record" pursuant to OPRA and the complaint should be dismissed.
2. Find that it is not appropriate for the GRC to address the issue of whether the record request form used by the City of Garfield was in compliance with N.J.S.A. 47:1A-5 as there has been no denial of access to a government record under N.J.S.A. 47:1A-1.1
3. Dismiss the complaint.
4. The custodian responded in a timely manner in one business day.

Mr. Spigner asked for clarification regarding Garfield's position. Conversation ensued among the Council members regarding certification in the form of an affidavit.

A motion to accept the Acting Executive Director's recommendation was made by Ms. Schonyers and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Nancy Davis v. Rumson Fair-Haven BOE (2003-56)

Mr. Dice presented the facts of the complaint to the Council and recommended that they:

1. Find that the requested minutes of the BOE meeting are "government records" pursuant to N.J.S.A. 47:1A-1.1.

2. Find that the requested Executive (“closed”) session minutes are exempt from disclosure pursuant to the Open Public Meetings Act (OPMA) at which the public body discusses anticipated litigation, N.J.S.A. 10:4-12(b)(7) and that pursuant to the BOE statement, the BOE discussed in that closed session the same incident for which it has received a Tort Claims Notice on behalf of Michael Rafi. .
3. Dismiss the Complaint.
4. Find that the custodian responded in a timely manner, within one business day.

Mr. Spigner questioned the Government Records Council jurisdiction over this matter. Mr. Maltese stated that the Acting Executive Director could communicate to the requester that she may have legal recourse under the Open Public Meeting Act.

Ms. Hook made a motion to accept the Acting Executive Director’s recommendation and Mr. Spigner seconded it. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Fred Burnett – Data Trace v. County of Somerset (2003-129)

Mr. Dice reviewed the issues in this case involving the fees for producing copies of the requested documents in a TIFF format on a CD-Rom, microfilm and paper and recommended that the Council:

1. In this case, the per page charge for **paper** copies should be \$2.00 per page. N.J.S.A. 47:1A-9(b) indicates that OPRA will not abrogate other state regulations. The custodian has accurately indicated that N.J.S.A. 22A:2-29 should govern the per page charge for **paper** copies of the subject records. However, this case may only partially involve a request for paper copies.
2. The fee for digital, microfilm and tape format copies of records on file with the county clerk is dictated by N.J.S.A. 47:1A-5.
3. Order the custodian to advise the Acting Executive Director and the requestor by date certain what the cost of providing the requestor copies of the documents in the requested medium would be. The custodian must also provide a detailed explanation of the basis for the cost(s). The Custodian’s counsel alleges its records are found in a certain number of “books” that will take a certain number of days to copy onto CD. However, no attempt is made to differentiate between records currently in paper, microfilm or computer. The custodian should advise the requestor and the Executive Director. Such explanation should include but not be limited to:

- What categories of records exist only in printed (paper) form that are not yet on microfilm or computer, the dates of the records in each category, the cost of providing (a) paper copies as calculated by N.J.S.A. 22A:2-29 or (b) computer scanned images of these records in TIFF format on CD-Rom pursuant to N.J.S.A. 47:1A-5. Here we assume that the clerk no longer places paper records onto microfilm and, instead, scans them onto computer. If this is incorrect, the custodian should also state the cost of providing microfilmed images of the paper copies.
- What categories of records are currently available on microfilm that are not yet scanned onto computer and readily available in TIFF format on CD-Rom, the dates of the records in each category, and the cost of (a) providing paper copies of microfilmed records; (b) providing a duplicate microfilm tape and (c) transferring microfilm images into TIFF format on CD-Rom.
- What categories of records are already scanned onto computer, the dates of records in each category, and the cost of providing copies of these records in TIFF format on CD-Rom.
- The costs associated with duplicating specific types of records such as maps or oversized records.
- The time it will take to provide the requestor microfilm copies and CD rom copies for each category of records.

The custodian may, of course, allow the requestor to visit its office and make copies if legitimate security concerns can be addressed. It is possible that county employees working alongside requestor's staff can scan images onto CD Rom securely and more quickly than the county staff can, working alone. If the requestor agrees to the charge in writing, the Acting Executive shall provide the custodian 10 business days within which to provide requestor the records unless the custodian provides credible proof that providing the records within that time would substantially disrupt agency operations.

If the requestor advises in writing that he is challenging the lawfulness of the charge under OPRA, the Acting Executive Director will afford the custodian the opportunity to reply and shall prepare the issue for adjudication by the Council.

4. The custodian responded in a timely manner in two business days.

Deputy Attorney General Barbara Conklin added that the OPRA provisions apply to digital copies as well as microfilm and that N.J.S.A. 22A:2-29 applies only to printed, paper copies of records.

Mr. Maltese recommended that the Council review the Blau v. Somerset County in regard to time periods and conditions and impose the same in this complaint. After clarification, Mr. Maltese asked for a motion to accept the Acting Executive Director's recommendation with the same time allotment as imposed in the Blau case. Therefore, recommendation number three would be amended to reflect the time period provided to the custodian.

Mr. Spigner asked if there is a standard that exists providing guidelines for copy costs to all formats. Mr. Dice addressed the issue stating that a set cost would vary depending on geographic location throughout the State. A conversation regarding the various costs ensued.

Mr. Maltese asked for a motion to accept the amended Acting Executive Director's recommendation. Mr. Spigner made the motion and Ms Hook seconded it. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Shain v. Township of Lakewood (2002-11)

Mr. Dice read the Motion for Reconsideration and Request for Due Process Hearing submitted by the custodian's counsel. Acting Executive Director Dice recommended that the Council accept the Motion for Reconsideration and then refer the matter to the Office of Administrative Law for a hearing to determine if the custodian knowingly and willfully violated OPRA.

Mr. Maltese asked for a motion to amend the Council's previous order to read:

- Refer the Complaint to the Office of Administrative Law (OAL);
- Request an expedited hearing;
- To retain the right to make the final decision after receipt of the decision from OAL; and
- Remove bullets two and three which address the custodian's fine and the recommendation to dismiss the complaint.

The motion was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None
Absent: Mr. Monzo

Arthur Minuskin v. New Jersey Division of Law (2002-88)

Mr. Dice reviewed the Complaint heard by the Council at the November meeting. Mr. Dice was asked to seek explanations and certification from the custodian. Mr. Dice recommended that the Council adopt the November 6, 2003 Finding and Recommendations, and find:

- The custodian properly responded to the request;
- Correctly denied the request; and
- The request was handled in a timely manner.

A motion to accept the Acting Executive Director's recommendation as amended was made by Mr. Spigner and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Robert Blau v. Union County (2003-75)

Mr. Dice reviewed the responses provided by the parties pursuant to the Council's November 13, 2003 Final Decision on Access; Interim Order on Cost of Duplication and Custodian Penalty. Mr. Dice informed the Council that a request for reconsideration was submitted in addition to the requested paperwork.

Mr. Dice recommended that the Council:

- Consider the issue of knowing and willful;
- Refer the request for an evidentiary hearing to the Office of Administrative Law; and
- Deny the request for reconsideration.

Deputy Attorney General Barbara Conklin explained to the members of the Council that the motion for reconsideration is based only on the portion of the order that is asking the custodian to provide copies of the records in a DVD or CD-ROM format and to estimate the cost.

Mr. Maltese asked for a motion to deny the motion for reconsideration. Ms. Schonyers made the motion and it was seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Mr. Maltese suggested referring the issue of cost to the Office of Administrative Law. A motion was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

A motion to refer the knowing and willful issue in this matter to the Office of Administrative Law was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Robert Blau v. Somerset County (2003-86)

Mr. Dice reviewed the responses provided by the parties pursuant to the Council's November 13, 2003 Final Decision on Access; Interim Order on Cost of Duplication and Custodian Penalty. Mr. Blau has asked for an evidentiary hearing. Mr. Dice recommended that the issue of cost be referred to the Office of Administrative Law.

A motion to refer the issue in this matter to the Office of Administrative Law was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Absent: Mr. Monzo

Mr. Maltese opened the meeting to the public.

Neil Carol from Hudson County. Asked what the Government Records Council was planning in regard to e-mails.

Donna Synder from Mansfield Township. Ms. Synder asked the Council if they have had time to reach out to other bodies and associations to stress the seriousness of their part in timely compliance, back to the custodians.

Hearing no more public comment, Mr. Maltese called for a motion to close the public portion, and a motion to adjourn at 12:20 p.m. The motion was approved by consensus.

Respectfully submitted,

/s/ Virginia Hook, Secretary